IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 537-71-R

JOHN R. DILLARD, individually, and on behalf of all other persons similarly situated, COMPLAINANT

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, THOMAS P. HARWOOD, JR., Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY, DEFENDANTS

COMPLAINT

1. This is an action for a temporary restraining order, a preliminary and permanent injunction, and damages authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution of the United States. The rights, privileges and immunities for which redress is sought are those secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This is also an action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, to declare the rights established by the aforementioned constitutional provision.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. § 1983; jurisdiction is further conferred on this Court by 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments, and by 28 U.S.C. §§ 2281 and 2284 providing for a three-judge district court.

3. Plaintiff respectfully requests that a three-judge dis-

trict court be convened pursuant to 28 U.S.C. § 2281, for the reason that he seeks an injunction to restrain the defendants, officers of the State of Virginia and their agents, from the enforcement, operation and execution of a statewide regulation by reason of its repugnance to the Constitution of the United States.

4. Plaintiff John R. Dillard is a citizen of the United States and a resident of the State of Virginia. Plaintiff's sole income had been forty dollars and eighty cents ($40.80) per week paid by defendant, Aetna Casualty and Surety Company, pursuant to an award of Workmen's Compensation by the defendant, Industrial Commission of Virginia.

5. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a), (b) (2) of the Federal Rules of Civil Procedure. The class which plaintiff represents is all persons similarly situated who are recipients of Workmen's Compensation pursuant to the Virginia Workmen's Compensation Act (Title 65, Code of Virginia, as amended) and who are, therefore, subject to having their benefits terminated prior to a hearing before the Industrial Commission of Virginia. The members of the class on behalf of whom plaintiff sues are so numerous as to make joinder impracticable. There are questions of law or fact common to all members of the class, since plaintiff challenges the validity of a rule or regulation which is alleged to be applied uniformly to all members of the class on grounds available to all members of the class; to wit, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The claims of the plaintiff are typical of the claims of the members of the class. The plaintiff will fairly and adequately protect the interest of the members of the class.

6. Defendant Thomas M. Miller is the chairman of the Industrial Commission of Virginia. Defendants M. Edward Evans, and Thomas P. Harwood, Jr., are the other members of said Commission. The Defendant, Industrial Commission of Virginia, is empowered, under Section 65.1-18 of the Code of Virginia, as amended, to make

rules for carrying out the purposes of the Virginia Workmen's Compensation Act, including the Rule herein complained of.

7. Defendant, Aetna Casualty and Surety Company, is a Connecticut corporation whose registered agent is Richard L. Williams, 1400 Ross Building, Richmond, Virginia 23219, and which under the Act (Section 65.1-111 and 65.1-113) was the insurance company obligated to pay workmen's compensation to the plaintiff, John R. Dillard.

8. The defendant, Aetna Casualty and Surety Company, paid the plaintiff, John R. Dillard, pursuant to the provisions of the Act until such defendant made an Application For Hearing under Rule 13 of the Rules of the Industrial Commission of Virginia and discontinued paying workmen's compensation to the plaintiff.

9. Plaintiff, John R. Dillard, on March 15, 1971, had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia approved, on April 7, 1971, a memorandum of agreement entered into on March 30, 1971, "for the payment of compensation under the Workmen's Compensation Act" and awarded compensation of forty dollars and eighty cents ($40.80) per week, during incapacity, beginning March 23, 1971. (Copy of which is attached as Exhibit I.)

10. On June 3, 1971, the defendant Aetna Casualty and Surety Company, filed an Application for Hearing, pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia and, pursuant to the said Rule discontinued plaintiff, John R. Dillard's compensation. (Copy attached as Exhibit II.)

11. On July 16, 1971, a hearing was held on defendant, Aetna Casualty and Surety Company's application.

12. On August 25, 1971, defendant Commissioner M. Edward Evans wrote an opinion finding plaintiff, John R. Dillard, still unable to return to work, and awarded him all accrued compensation back to June 3, 1971, and directed that compensation be resumed under the outstanding award. (Copy attached as Exhibit III.)

13. On September 16, 1971, the defendant Aetna Casualty and Surety Company, made another Application for Hearing pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, and discontinued plaintiff John R. Dillard's Workmen's Compensation. (Copy attached as Exhibit IV.)

14. Plaintiff John R. Dillard's sole source of income for himself and his wife has been, since his accident on March 15, 1971, the workmen's compensation. The discontinuance of the compensation has caused the Plaintiff John R. Dillard and his wife extreme and irreparable hardship and suffering, in that plaintiff has been unable to purchase the minimum necessities of life.

15. Rule 13 of the Rules of the Industrial Commission of Virginia violates plaintiff's, and the class he represents, rights to Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said Rule allows workmen's compensation to be discontinued on the grounds of a change of condition prior to the holding of an evidentiary hearing as required by the guarantees of Procedural due process of the Constitution of the United States.

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, respectfully prays that this Court:

1. Issue a temporary restraining order directing the defendants to resume paying the plaintiff compensation under his outstanding award.

2. Assume jurisdiction of this cause, convene a three-judge district court to determine this controversy pursuant to 28 U.S.C. §§ 2281 and 2284 and set this cause down for hearing.

3. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring that Rule 13 of the Rules of the Industrial Commission of Virginia violates and is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Enter a preliminary injunction pending the final determination of this matter, and thereafter, a permanent injunction prohibiting, restraining and enjoining defendants, their successors in office, agents and employees from enforcing, applying or implementing the aforesaid Rule.

5. Grant plaintiff his costs herein and any additional or alternative relief as the court may deem to be just and appropriate.

Respectfully submitted,

/s/ John R. Dillard
JOHN R. DILLARD

THE LEGAL AID SOCIETY
OF ROANOKE VALLEY
702 Shenandoah Avenue, N.W.
Roanoke, Virginia 24016

/s/ Kurt Berggren
KURT BERGGREN

/s/ John M. Levy
JOHN M. LEVY
Attorneys for Plaintiffs

VERIFICATION

JOHN R. DILLARD, being duly sworn, deposes and says that he is the named plaintiff in the above and foregoing Complaint and that the facts alleged therein are true to the best of his knowledge and belief.

/s/ John R. Dillard
JOHN R. DILLARD

[Jurat Omitted in Printing]

FORM NO. 9 — 11/6/69 — 100M

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF WORKMEN'S COMPENSATION

INDUSTRIAL COMMISSION OF VIRGINIA

DIVISION OF CLAIMS

P. O. BOX 1794
RICHMOND, VIRGINIA 23214

Claim No. 169-570 (R58 CC 163256 MR)

Case of John R Dillard
Accident: 3-15-71

AWARD

Approval of Agreement
JF

Date April 7, 1971

To Roanoke Hills Incorporated, (Employer)
505 - 6th Street
Roanoke, Virginia

and Mr. John R Dillard, (Employee)
Box 523, Route 11
Roanoke, Virginia

and AEtna Casualty & Surety Company, (Insurance Carrier)
P O Box 781
Roanoke, Virginia 24004

Note: The compensation herein awarded is to be paid by the insurance company or by the employer, if self-insurer. In the event that payment is delayed, the employee is requested to write the insurance company or his employer, before taking it up with the Commission.

Take notice that the Industrial Commission of Virginia has approved the memorandum of agreement entered into March 30, 1971 for the payment of compensation under the Workmen's Compensation Act, and in accordance with the provisions of said Act enters an award of compensation as follows:

$60.80 per week, during incapacity, payable weekly, beginning March 23, 1971.

Medical benefits are awarded for the full statutory period.

INDUSTRIAL COMMISSION OF VIRGINIA

If incapacity (disability) as indicated in Section 65.1-62 exceeds six (6) weeks, compensation SHALL be paid for such six (6) days of incapacity to work, in accordance with Section 65.1-54 and Section 65.1-56, in addition to such payments as may be awarded under Section 65.1-55 and the Commission so advised.

EXHIBIT I

FORM NO. 5—7-1-70 20M

INDUSTRIAL COMMISSION OF VIRGINIA

P. O. Box 1794
Richmond, Virginia 23214

APPLICATION FOR HEARING

Docket No. Roanoke
Date of Injury 6-2-71
Employee 6-3-71
Employer 6-4-71

File No. 169-570

Employee John R. Dillard

Employer Roanoke Mills, Inc.

Date of Accident 3/15, 19 71 Average Weekly Wage $ 68.00

Place Where Accident Occurred Salem (City or County) Virginia (State)

Nature of Injury or Occupational Disease: Right Inguinal Hernia

Date Disability Began: 3/16, 19 71

Date of Return to Work: Able to R/W 6/1, 19 71, and wage then earned $ 68.00
As per medical report from Dr. W. L. Sibley, Sr. dated 6/19/71.

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

(1) Accidental Injury ..... ( )

(2) Occupational Disease ..... ( )

(3) Death on _____, 19____, due to Accidental Injury ..... ( )

Occupational Disease ..... ( )

(4) Change in Condition ..... (x)

If application is based on a change in condition, state nature of change:

Claimant able to return to work as per medical report from Dr. W. L. Sibley, Sr. dated 5/19/71. Has not signed Agreed Statement of Fact.

Compensation was last paid at the rate of $40.80 per week through the 2nd day of June, 19 71.

Signature of Applicant: Alice C. Hundley
ÆTNA CASUALTY & SURETY CO.

Address: P. O. Box 781
ROANOKE, VA. 24004

Signed this 1st day of June, 19 71

Subpoenas for witnesses will be issued by the Industrial Commission on request or may be obtained at the Clerk's Office of the City or County where the hearing will be held (§65.1-21, Code of Va.). Medical reports are acceptable in lieu of physicians' personal appearances.

cc: Roanoke Mills, Inc.
John R. Dillard

EXHIBIT II

EXHIBIT III

VIRGINIA
IN THE INDUSTRIAL COMMISSION

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INCORPORATED, EMPLOYER
AETNA CASUALTY & SURETY COMPANY, INSURER

Claim No. 169-570

[Aug. 25, 1971]

Claimant appeared in person.
John M. Levy, Attorney at Law, The Legal Aid Society of Roanoke Valley, P. O. Box 479, Roanoke, Virginia 24003, for the Claimant.

Kime, Jolly & Clemens (G. O. Clemens) Attorneys at Law, 430 Clay Street, East, Salem, Virginia 24153, for the Defendants.

Hearing before EVANS, Commissioner, at Roanoke, Virginia, on July 16, 1971.

Opinion by EVANS, Commissioner.

John R. Dillard sustained a right inguinal hernia as a result of an accident arising out of and during the course of his employment with Roanoke Mills, Incorporated, on March 15, 1971. The hernia was surgically repaired and compensation paid under an award of the Commission through June 2, 1971. At that time the employer applied for a hearing wherein it seeks to terminate payment under the award on the grounds that the em-

ployee had been discharged by the attending physician as able to return to work.

In support of its application the employer submitted into the evidence a report of Dr. W. L. Sibley, Sr., Roanoke, Virginia, dated May 19, 1971. The report is as follows:

> "Mr. Dillard was operated on by me about two months ago for repair of a right inguinal hernia. Almost ever since the operation he has complained of pain and swelling in the area of the operation but, as far as I can tell from looking at him and examining him, I find nothing abnormal with the operative area.
>
> "He contends that his pain is so severe that he can't work and requires prescriptions to relieve the pain. I can't say that he doesn't have pain, but I do not know why he has it.
>
> "He has requested two more weeks in order to see if the pain will disappear, which he says he has. I have granted him this much time off. I will see him again in about two weeks. As far as I can tell from physical examination, he appeared to be recovered."

The employee was again examined by Dr. Sibley on June 2, 1971. At that time the examination disclosed slight swelling at the site of the operation but this was deemed to be usual following surgery. However, claimant was complaining of severe pain. Dr. Sibley did not express an opinion as to whether or not the employee should return to work.

Claimant placed himself under the care of Dr. C. F. Matthews, Martinsville, Virginia. Under date of July 14, 1971, this physician reported that he had been treating the employee for pain in the right groin; that the right groin was indurated and swollen and that the patient was still disabled for work.

The parties at issue requested permission to have the employee examined by a physician mutually chosen by

them for the purpose of obtaining his opinion as to the employee's continuing disability. This examination was made on August 12, 1971, by Dr. Robert L. A. Keeley, Roanoke, Virginia. Pertinent portions of the report are as follows:

> "Examination reveals a transverse incision in the right inguinal region, with tenderness in the fascia beneath the incision. The femoral artery pulse is excellent. There is no evidence of a recurrence, either lying down or standing up or when the patient coughs or strains or is relaxed. The fascia overlying the cord is exquisitely tender according to the patient. There is no appreciable edema in the scrotum or in the right testicle. Patient states that when he sits down this discomfort is relieved. I find no evidence of anything other than an over sensitive thickened fascia beneath the subcutaneous tissue where the hernia repair was performed. Ordinarily, most patients who have had a hernia repair are quite comfortable and ready to go back to work after 8 weeks, and in this respect this patient is unusual. In my past experience, I have had an occasional patient who complained of tenderness in the wound for an extended period of time, which finally subsided. I believe the choices open to us in this patient are: 1) to allow an additional month for tenderness to subside, 2) offer him reoperation with excision of the right testicle and cord, or 3) Number 1 followed by number 2.
>
> "The patient gives the appearance of being properly motivated and most males who are willing to give up a cord and testicle in order to get more comfortable and get back to work would seem to be properly motivated."

The evidence fails to preponderate in proving that this employee had sufficiently recovered from the effects of his industrial injury to enable him to return to work as alleged in the application. Accordingly, the relief sought must be denied.

AWARD

Compensation payments shall be resumed under the outstanding award as of June 3, 1971, and continue thereunder until such time as subsequent conditions justify a modification.

All accrued compensation shall be paid upon receipt of this award and future payments made each week thereafter as they accrue.

E.2

INDUSTRIAL COMMISSION OF VIRGINIA
P. O. Box 1794
Richmond, Virginia 23214

APPLICATION FOR HEARING

Roanoke
9-17-71
9-20-71
9-21-71

File No. 169-570

Employee JOHN R. DILLARD

Employer ROANOKE MILLS, INC.

Date of Accident 3/15, 19 71 Average Weekly Wage $68.00

Place Where Accident Occurred Salem (City or County), Va. (State)

Nature of Injury or Occupational Disease: Right inguinal hernia

Date Disability Began: 3/16, 19 71

Date of Return to Work: -, 19 ____, and wage then earned $ ____

The applicant requests a hearing before the Industrial Commission of Virginia on the grounds of:

(1) Accidental Injury ( )

(2) Occupational Disease ( )

(3) Death on ____, 19 ____, due to Accidental Injury ( )

Occupational Disease ( )

(4) Change in Condition (x)

If application is based on a change in condition, state nature of change:

Refusal of medical treatment as outlined by Dr. Keeley and in accordance with your award dated d/25/71.

Compensation was last paid at the rate of $40.80 per week through the 17th day of Sept., 19 71

Signature of Applicant: [signature]
ÆTNA CASUALTY & SURETY CO.

Address: P. O. Box 781
ROANOKE, VA. 24004

Signed this 16th day of Sept., 19 71

Subpoenas for witnesses will be issued by the Industrial Commission on request or may be obtained at the Clerk's Office of the City or County where the hearing will be held (§65.1-21, Code of Va.). Medical reports are acceptable in lieu of physicians' personal appearances.

cc: Roanoke Mills, Inc.
John R. Dillard

EXHIBIT IV

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Comes now the defendant, Aetna Casutalty and Surety Company, and pursuant to the Federal Rules of Civil Procedure moves this Court to dismiss the complaint on the following grounds:

I. There is no case or controversy now existing between Aetna and plaintiff as required by Article III, Section 2 of the Constitution of the United States. Actions taken by Aetna in admitting the liability renders plaintiff's claim moot (Exhibits A & B).

II. Plaintiff alleges rights which can be secured by existing state laws and procedures. Plaintiff seeks not political or civil rights, whose loss can never be remedied but rather the alteration of procedures dealing with monetary awards; later judgment would make plaintiff whole.

Further, plaintiff seems to base his case on the conclusion that termination of payment is required by Rule 13. The statute and regulations do not by their terms so require. Thus plaintiff's alleged deprivation at best derives from a statutory ambiguity, a matter which should first be heard in the state courts.

Accordingly, since this does not involve political rights and plaintiff has not exhausted or tested state remedies, this Court should abstain until such good faith attempt is made.

III. This Court lacks jurisdiction over the complaint by reason of the following:

A. This action is not authorized of 42 USC § 1983 as the actions complained of do not deprive plaintiff of constitutional rights, privileges or immunities.

B. 28 USC §2281 confers no jurisdiction over private parties.

C. Since the gravamen of complaint is a postponement of a monetary award of less than $10,000, the amount pleaded is insufficient to confer jurisdiction upon this Court.

IV. Claimant has failed to state a cause of action upon which relief can be granted.

A. Rule 13 does not condone the termination herein complained of; rather, it provides a means by which the carrier can obtain a hearing but, as a precondition, requires the carrier to pay the award to the date of application. Any subsequent termination is purely the election of the carrier and thus is a private matter between carrier, employee and employer. Virginia neither requires nor sanctions the termination; thus there is no deprivation under color of state law.

B. Plaintiff may elect to retain his common law rights against his employer and avoid any participation in the contractual scheme. His voluntary election therefore precludes an action for recovery based on 42 USC §1983.

C. Involved here are contractual rights between private parties, the application of which is not a matter for adjudication by federal courts under § 1983. Since there are no "public" or "constitutional" rights, privileges or immunities herein involved, 42 USC § 1983 does not create a cause of action.

V. By failing to join all other insurance companies in this state which write "Workmen's Compensation" insurance and all self-insured employers subject to the provisions of the Virginia Workmen's Compensation Act, plaintiff has not met the requirement of Rule 19, Federal Rules of Civil Procedure.

VI. Plaintiff does not adequately represent the class that he seeks to protect, nor can he fairly and adequately protect the interest of the members of the class whose

major protection is Rule 13. Accordingly, his claim of a class action does not meet the requirements of Rule 23.

Respectfully submitted,
AETNA CASUALTY AND
SURETY COMPANY

By /s/ [Illegible]
Of Counsel

Willard I. Walker
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

EXHIBIT A

VIRGINIA:

IN THE INDUSTRIAL COMMISSION OF VIRGINIA

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INC., EMPLOYER

and

AETNA CASUALTY AND SURETY COMPANY, INSURER

PETITION FOR APPROVAL OF COMPROMISE SETTLEMENT

TO THE HONORABLE COMMISSIONERS OF THE INDUSTRIAL COMMISSION OF VIRGINIA

Your petitioners, John R. Dillard, by counsel, Roanoke Mills, Inc., Employer and Aetna Casualty and Surety Company, Insurer, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Virginia, 1950 as amended, respectfully request approval by the Industrial Commission of Virginia of a compromise settlement as hereinafter set forth and represents unto the Industrial Commission as follows:

1. John R. Dillard sustained an injury by accident arising out of an in the course of his employment with Roanoke Mills, Inc. on March 15, 1971, which resulted in temporary-total disability of the claimant as is set forth in the various medical reports filed with the Industrial Commission and findings of the Commission at hearings prior to this date.

2. Despite medical reports indicating an ability of the claimant to return to work on several occasions, the claimant has not returned to Roanoke Mills, Inc. since the date of the accident.

3. Medical reports are now on file with the Industrial Commission which indicate that there is no organic problem or psyciatric problem with Mr. Dillard and he can, in fact, return to work. Also recent medical reports are on file with the Industrial Commission which indicate that there is an organic problem with Mr. Dillard and he can not, in fact, return to work.

4. The employee, John R. Dillard, maintains that he is still unable to work as a result of injuries received in the accident of March 15, 1971. The employer and insurer believe that he is able to return to work as of this date.

5. Up through July 21, 1972, the claimant has received in weekly benefits the sum of TWO THOUSAND FOUR HUNDRED EIGHTEEN AND 86/100 DOLLARS ($2,418.86) and in medical payments the amount of NINE HUNDERD TWENTY THREE AND 64/100 DOLLARS ($923.64).

6. Notwithstanding the foregoing disagreements, your petitioners have now reached a compromise agreement with full knowledge and understanding of the hereinstated facts and the general medical situation of the claimant by the terms of which compromise agreement the insurer would pay to the claimant, John R. Dillard, the additional sum of FOUR THOUSAND TWO HUNDRED FORTY-THREE AND 20/100 ($4,243.20) representing 102 weeks of benefits, payable as a lump sum, the employer and insurer to be released and forever discharged from any and all liability for any further compensation or medical expenses that are now due or may hereafter become due as a result of any claim arising from the accident and the injury to the claimant which occurred on March 15, 1971.

Respectfully submitted,

_____

JOHN R. DILLARD

ROANOKE MILLS, INC.
and
AETNA CASUALTY AND SURETY COMPANY

By _____
Of Counsel
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

EXHIBIT B

VIRGINIA: Aug. 8, 1972

IN THE INDUSTRIAL COMMISSION OF VIRGINIA

JOHN R. DILLARD, CLAIMANT

v.

ROANOKE MILLS, INC., EMPLOYER

and

AETNA CASUALTY AND SURETY COMPANY, INSURER

I.C. #169-570

ORDER

This day came the parties hereto and filed their petition for approval of compromise agreement whereby the employer and insurer will pay to John R. Dillard as a lump sum, the amount of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 ($4,243.20) in consideration of the employer and insurer being forever released and discharged by the claimant from any compensation or medical payments that may be now due or hereafter become due by reason of the accident which occurred to the claimant on March 15, 1971.

Upon consideration whereof from statements made in the petition and by the parties in person and through counsel and the medical reports filed herein, the Commission being of the opinion that the best interest of the claimant would be served by approving the compromise settlement as set forth in the said petition,

IT IS ORDERED that the said agreement be and the same hereby is approved and it is FURTHER ORDERED that from the sum of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 ($4,243.20) nothing is to be paid to John Levy, attorney for the claimant for legal services rendered and that the balance in the

sum of $4,243.20 be paid to John R. Dillard, claimant, as a lump sum.

IT IS FURTHER ORDERED that upon payment of the sum of FOUR THOUSAND TWO HUNDRED FORTY THREE AND 20/100 ($4,243.20), the said Roanoke Mills, Inc. and the Aetna Casualty and Surety Company shall be released and forever discharged from any and all liability upon them by reason of the injury to claimant which occurred on March 15, 1971.

ENTER: August 7, 1972

/s/ THOMAS P. HARWOOD, JR.
Commissioner

We ask for this:

/s/ JOHN R. DILLARD
John R. Dillard

/s/ ELIZABETH DILLARD
Witness

ROANOKE MILLS, INC.
and
AETNA CASUALTY AND SURETY COMPANY

By /s/ [Illegible]
Of counsel

By /s/ JOHN LEVY
John M. Levy,
Counsel for John R. Dillard

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION TO DISMISS

Now come the defendants, Industrial Commission of Virginia, Thomas M. Miller, Chairman, M. Edward Evans and Thomas P. Harwood, Jr., Commissioners, by counsel, and move the Court for the entry of an order dismissing the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim on which relief could be granted. In support of said motion, defendants say as follows:

1) Plaintiff alleges that Rule 13 of the Rules of the Industrial Commission of Virginia, promulgated pursuant to § 65.1-18 of the Code of Virginia (1950), as amended, is violative of due process rights because it allows workmen's compensation benefits to be terminated by the insurer prior to the holding of an evidentiary hearing, and he asks that defendants be enjoined from enforcing said Rule. Rule 13 provides, in pertinent part, as follows:

> "All applications for hearing by employer or insurance carrier under § 65-95 [now § 65.1-99] shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65-60 [now § 65.1-63]), medical attention (§ 65-85 [now § 65.1-88]), or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date four-

> teen days prior to the date the application is filed, whichever is later."

Defendants point out that the operation of Rule 13 inures to the employee's *benefit*, not to his detriment, since in the absence of Rule 13 (the relief requested by plaintiff) the insurer would be permitted to cut off benefits unilaterally at *any* time, regardless of when it filed its application, whereas Rule 13 requires that payments be continued up to the date of filing the application for hearing or said application will not be considered. As the Supreme Court of Virginia noted in *Parker* v. *Manchester Board & Paper Co., Inc.*, 201 Va. 328, 111 S.E.2d 453 (1959):

> "More than thirty years ago when it was found by the Commission that some employers were arbitrarily disregarding the effect of outstanding awards and terminating payments direct by such awards, a Rule—the same now before us—was promulgated providing that compensation be paid to the date application was made for a proper termination under § 65-95 (then § 1887(47)) [now § 65.1-99]. The Rule has since been continually in force."

Thus it appears that what the plaintiff really seeks is not the *abolition* of Rule 13, but its *extension* to require that compensation be paid up to the date of the hearing—in other words, the promulgation of a Rule 13(a). This goal must be achieved through the legislative process of the General Assembly or the Industrial Commission.

2) Regardless of any need for reform of the Virginia workmen's compensation procedures in order to better provide for indigent claimants, no federal question is presented by any shortcoming of the existing system. Workmen's compensation, although regulated by a statutory framework, is a substitute for the common-law tort action and is participated in *voluntarily* by plaintiff and all others similarly situated. Sections 65.1-23 and 65.1-26 of the Code of Virginia detail the method by which an employee may exempt himself from the provisions of the

Workmen's Compensation Act, and § 65.1-44 specifically provides that any employee so exempt has the right to proceed at common law. One who chooses to participate, therefore, in a program which provides him with a better remedy than he would otherwise have had cannot complain that due process requires that he be entitled to the best of all possible remedies, or one which would do more for him than the one provided. In short, if plaintiff chose to be covered by workmen's compensation, he must take the system as he finds it.

3) Unlike *Goldberg* v. *Kelly*, 397 U.S. 253, 91 S.Ct. 1011 (1970), no state fund is involved in the payments to recipients of workmen's compensation. Payments come from insurance carriers or firms which act as self-insurers. These carriers, as private parties, should not be held to the same balancing-or-interests criteria as were state and local governments in *Goldberg* v. *Kelly*, *supra*, since they have no opportunity to recoup benefits wrongfully paid.

4) Virginia's statutory framework does not authorize the *termination* of benefits as alleged by plaintiff, it permits only the initiation of a procedure by which benefits may ultimately be terminated. Should plaintiff be dissatisfied with the temporary cessation of benefits pending an administrative hearing, he is entitled by the provisions of § 65.1-100 to reduce his award to judgment in an appropriate court of record and compel the resumption of benefits. It should be noted that in such a case the court has no discretion and must enter judgment against the employer or his insurer. *Parrigen* v. *Long*, 145 Va. 637, 134 S.E. 562 (——); *Richmond Cedar Works* v. *Harper*, 129 Va. 481, 106 S.E. 516 (——). Finally, any questions whether the Virginia statutory scheme permits the type of termination alleged by plaintiff should properly

be first determined by Virginia courts rather than by this Court.

INDUSTRIAL COMMISSION OF VIRGINIA
THOMAS M. MILLER
M. EDWARD EVANS
THOMAS P. HARWOOD, JR.

By: /s/ VANN H. LEFCOE
Counsel

Andrew P. Miller
Attorney General of Virginia

Vann H. Lefcoe
Assistant Attorney General

Anthony F. Troy
Assistant Attorney General
Supreme Court Building
Richmond, Virginia

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

INTERROGATORIES TO DEFENDANTS INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, M. EDWARD EVANS and THOMAS P. HARWOOD, JR.

Plaintiff requests that Defendants, Industrial Commismission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr. answer under oath the following interrogatories within thirty days. One answer to each said interrogatory, if agreed upon by all said Defendants, will be sufficient for all said Defendants.

1. State the total number of employees in the State of Virginia covered by the provisions of the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

2. State the total number of employers in the State of Virginia covered by the provisions of the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

3. State the number of employees in the State of Virginia who are recorded as having filed a notice of exemption pursuant to Sections 65.1-23, 65.1-25 and 65.1-26 of the Code of Virginia, as amended. Also state the number of said notices filed in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

4. State the number of employers in the State of Virginia who are self-insurers, under Section 65.1-108 of the Code of Virginia, as amended; and state the number of employees of each of such employers.

5. State the number of memoranda of agreements, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Virginia, as amended, which have been approved by the Industrial Commission of Virginia in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

6. State the number of memoranda of agreement, pursuant to Sections 65.1-45 and 65.1-93 of the Code of Vir-

ginia as amended, which were not approved by the Industrial Commission of Virginia in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

7. State the number of hearings held pursuant to Section 65.1-94 of the Code of Virginia, as amended, for each one of the following years: 1967, 1968, 1969, 1970 and 1971, in the following categories:

(a.) On a failure to reach an agreement in regard to compensation.

(b.) On a disagreement as to the continuance of any weekly payments under an agreement.

8. For the hearings set out in the answers to Interrogatory Number 7(a) and (b), state for each one of the following years: 1967, 1968, 1969, 1970 and 1971:

(a.) The average length of time between the application for such a hearing and the notification of the parties of the decision by the Commission.

(b.) The greatest length of time and the shortest length of time between the application for such a hearing and the notification of the parties of the decision by the Commission.

9. State the number of rehearings on award, pursuant to Section 65.1-97 of the Code of Virginia, as amended, which were held in each of the following years: 1967, 1968, 1969, 1970 and 1971.

10. For the rehearings set out in the answers to Interrogatory Number 9, state for each one of the five years:

(a.) The average length of time between the application for review and the hearing or review of the evidence by the Commission.

(b.) The greatest length of time and the shortest length of time between the application for review and the hearing or review of the evidence by the Commission.

(c.) The average length of time between the hearing or review of the evidence and the decision of the Commission.

(d.) The greatest length of time and the shortest length of time between the hearing or review of the evidence and the decision of the Commission.

(e.) The number of decisions which changed the award.

11. State whether or under what conditions, an award is continued to be paid if an application for review is made pursuant to Section 65.1-97 of the Code of Virginia, as amended.

12. State the number of reviews of awards which were held by the Commission pursuant to Section 65.1-99 of the Code of Virginia as amended, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

13. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years the number of such reviews which were initiated upon:

(a.) Motion of the Commission.

(b.) Application of the employee who had been injured.

(c.) Application of the employer, including his insurer.

14. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years:

(a.) The average length of time between the data of the motion or application and the date the hearing or review was completed.

(b.) The greatest length of time and the shortest length of time between the date of the motion or application and the date the hearing or review was completed.

(c.) The average length of time between the completion of the hearing or review and the notification of the parties of the decision.

(d.) The greatest length of time and the shortest length of time between the completion of the hearing or review and the notification of the parties of the decision.

15. For the reviews set out in the answers to Interrogatory Number 12, state for each one of the five years the number of decisions in which the award was:

(a.) Ended.
(b.) Diminished.
(c.) Increased.

16. State the number of judgments on agreements or awards, under Section 65.1-100 of the Code of Virginia, as amended, which were obtained in each one of the following years: 1967, 1968, 1969, 1970 and 1971.

17. State the number of employers and employees who have voluntarily elected to be bound by the Virginia Workmen's Compensation Act, for each one of the following years: 1967, 1968, 1969, 1970 and 1971.

18. Describe in detail the procedures by which the approval or disapproval of the defendant Commission is given to the policies of insurance pursuant to Section 65.1-113 of the Code of Virginia, as amended.

Respectfully submitted,

/s/ John Levy
JOHN M. LEVY
10 S. 10th Street
Richmond, Virginia 23219
Kurt Berggren
702 Shenandoah Avenue, N.W.
Roanoke, Virginia 24016
Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWER

Aetna Casualty and Surety Company ("Aetna") for its answer, states the following:

1. Defendant denies the conclusionary allegations of Paragraphs 1 and 2 in that Aetna does not believe that a cause of action is created by Section 1983 and that the other provisions do not, therefore, establish jurisdiction of this Court.

2. Paragraph 3 does not require a response.

3. Aetna does not have sufficient facts to enable it to form a belief as to the truth or accuracy of the allegations contained in Paragraph 4 except that it does admit that plaintiff has been receiving $40.80 per week from defendant.

4. Defendant denies all conclusionary allegations in Paragraph 5 including the allegations that there are common questions of law affecting all members of the alleged class, that plaintiff's claims are typical of the alleged class claims and that plaintiff will fairly and accurately represent the interests of the members of the alleged class.

5. Defendant admits the allegations in Paragraphs 6, 7, 8, 9, 10, 11, 12 and 13.

6. Defendant does not have sufficient facts or information to enable it to form belief as to the truth or accuracy of the allegations of Paragraph 14.

7. Defendants denies the allegations of Paragraph 15.

WHEREAS, having fully answered the Complaint herein, defendant Aetna Casualty and Surety Company

moves the Court to dismiss the Complaint herein with costs to be taxed against plaintiff.

Respectfully submitted,
AETNA CASUALTY AND
SURETY COMPANY

By /s/ [Illegible]
Of Counsel

Willard I. Walker
J. Robert Brame, III
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWERS TO INTERROGATORIES

Now come the defendants, Industrial Commission of Virginia et als, and for answers to the Interrogatories served by the plaintiff herein say as follows:

1) Unknown. There are no records available to the Commission from which such information could be compiled.

2) 1967-60,263
1968-64,082
1969-66,030
1970-69,908
1971-75,919

3) Approximately 900 per year.

4) 125-Corporate self-insurers
10-School Boards
13-Cities
23-State Agencies
Approximately 140,000 employees, exclusive of School boards, Cities and State Agencies.

5) 1967-19,030
1968-19,288
1969-20,303
1970-21,017
1971-21,264

6) No specific figures are available but answers may be derived from defendants' business records which are maintained at the offices of the Industrial Commission of Virginia, Blanton Building, Richmond, Virginia. In accordance with Rule 33(c), Fed.R.Civ.P., counsel for plaintiff will be afforded a reasonable opportunity to examine, audit or inspect these records and to make copies, compilations, abstracts or summaries.

7) (a) 1967-1020
1968-1200
1969-1320
1970-1532
1971-1542

(b) 1967- 680
1968- 800
1969- 880
1970-1020
1971-1028

8) (a) Approximately three months.
(b) Approximately one month to eight months.

9) 1968-118
1969-140
1970-136
1971-133

10) Approximately: (a) One month.
(b) Two weeks to two months.
(c) One week.
(d) One day to thirty days.
(e) 5%.

11) Awards are occasionally continued voluntarily during an application for review where only the specific rating of disability is in issue.

12) Same Answer 7(b).

13) (a) Three a year.
(b) 1967-408 (Employers & insurers)
1968-480
1969-528
1970-612
1971-616
(c) 1967-272 (Employees)
1968-320
1969-352
1970-408
1971-410

14) See Answer 6.

15) See Answer 6.

16) Unknown. Approximately thirty (30) decisions are certified each year. No information is available on number of judgments obtained.

17) Employers—same as Answer 2.
Employees—same as Answer 1.

18) Standard workmen's compensation insurance policies are approved by the State Corporation Commission, which approval is accepted prima facie by defendants.

INDUSTRIAL COMMISSION OF VIRGINIA
Thomas M. Miller
M. Edward Evans
Thomas P. Harwood, Jr.

By: /s/ Thomas M. Miller
Commissioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

ANSWER

Now come the defendants Industrial Commission of Virginia, Thomas M. Miller, M. Edward Evans and Thomas P. Harwood, Jr., Commissioner, by counsel and for answer to the bill of complaint filed herein say as follows:

1) The allegations contained in paragraphs 1, 2 and 3 of the bill of complaint state conclusions of law which do not require an answer.

2) Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 4 except that defendants admit that plaintiff has been awarded the sum of $40.80 per week as workman's compensation by defendant Commission to be paid by defendant Aetna.

3) The allegations contained in paragraph 5 of the complaint state conclusions of law which do not require an answer.

4) The allegations contained in paragraphs 6 through 13 of the complaint are admitted.

5) Defendants are without information sufficient to form a belief as to the truth of the allegations contained in paragraph 14.

6) The allegations contained in paragraph 15 of the complaint state conclusions of law which do not require an answer.

7) Defendants reaffirm and incorporate herein the defenses heretofore raised in their Motion to Dismiss previously filed in this case on November 10, 1971.

Wherefore, defendants pray that the bill of complaint be dismissed and they be permitted to go hence with their costs.

INDUSTRIAL COMMISSION OF VIRGINIA
Thomas M. Miller
M. Edward Evans
Thomas P. Harwood, Jr.

By /s/ Anthony F. Troy
Counsel

Andrew P. Miller
Attorney General
Anthony F. Troy
Vann H. Lefcoe
Assistant Attorneys General
Supreme Court-Library Building
Richmond, Virginia 23219

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

STIPULATIONS OF FACTS

It is hereby stipulated and agreed by and between the plaintiff and the defendants, through their respective attorneys, that the following facts are not in issue in the above-style action:

1. John R. Dillard is a citizen of the United States and a resident of Virginia. On March 15, 1971, John R. Dillard had an accident arising out of and in the course of his employment.

2. The Industrial Commission of Virginia, on April 7, 1971, approved a memorandum of agreement entered into March 30, 1971 for the payment of compensation under the Workmen's Compensation Act and awarded John R. Dillard forty dollars and eighty cents ($40.80) per week, during his incapacity, beginning on March 23, 1971.

3. Aetna Casualty and Surety Company on June 3, 1971, filed an application for Hearing, pursuant to Section 65.1-99 of the Code of Virginia, as amended, and Rule 13 of the Rules of the Industrial Commission of Virginia.

4. John R. Dillard's compensation under the Memorandum of Agreement entered into on March 30, 1971, was discontinued by Aetna Casualty and Surety Company immediately after the Application for Hearing was filed on June 3, 1971.

5. On July 16, 1971, a hearing was held by the Industrial Commission of Virginia on Aetna Casualty and Surety Company's Application to determine whether there had been a change in John R. Dillard's condition which would enable him to return to work.

6. On August 25, 1971, Commissioner M. Edward Evans found that John R. Dillard was still unable to return to work, awarded him all accrued compensation

back to June 3, 1971 and directed that compensation be resumed under the outstanding award.

7. On September 16, 1971, Aetna Casualty and Surety Company filed an Application for Hearing pursuant to Section 65.1-99, of the Code of Virginia, as amended, and Rule 13 of the Industrial Commission of Virginia.

8. John R. Dillard's compensation under the Memorandum of Agreement and Opinion of Commissioner M. Edward Evans, was discontinued by Aetna Casualty and Surety Company immediately after the Application for Hearing was filed on September 16, 1971.

9. The defendants named as Commissioners of the Industrial Commission of Virginia have the authority to establish and alter the Rules of the Industrial Commission of Virginia.

/s/ [Illegible] Attorney for Plaintiff	3/ 9/72 Date
/s/ [Illegible] Attorney for Defendants,	3/10/72 Date
/s/ [Illegible] Attorney for Defendant	3/14/72 Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT

Now come the defendants, Industrial Commission of Virginia et als, and move the Court for the entry of an order awarding them summary judgment pursuant to Rule 56, Fed.R.Civ.P. In support of said motion, defendants say as follows:

1) On March 21, 1972, the defendant Industrial Commission amended its Rule 13 as shown in the underlined language on the attached certified copy of the Commission's minutes (Exhibit C). The aforesaid amendment became effective on April 1, 1972.

2) The effect of the amendment to Rule 13 is to require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing. Defendants submit that amended Rule 13 guarantees due process of law to claimants under the Virginia workmen's compensation laws, and that the instant case should be dismissed.

INDUSTRIAL COMMISSION OF
VIRGINIA
Thomas M. Miller
M. Edward Evans
Thomas P. Harwood, Jr.

By: /s/ Vann H. Lefcoe
Counsel

Andrew P. Miller
Attorney General

Vann H. Lefcoe
Anthony F. Troy
Assistant Attorneys General
Supreme Court Building
Richmond, Virginia 23219

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EXHIBIT C

MINUTES OF THE MEETING OF
THE INDUSTRIAL COMMISSION OF VIRGINIA

March 21, 1972

Present: Thomas P. Harwood, Jr., Chairman
M. E. Evans, Commissioner
Thomas M. Miller, Commissioner

It is ordered that Rule 13, Rules of the Industrial Commission, as heretofore amended, be, and it is hereby further amended, effective April 1, 1972, to read as follows:

Rule 13. Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.

All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. All applications by an employer

or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

INDUSTRIAL COMMISSION OF VIRGINIA

/s/ Thomas P. Harwood, Jr.
Chairman

Attest: /s/ Helen G. Cooper
Secretary

CERTIFIED—March 30, 1972

[SEAL] INDUSTRIAL COMMISSION OF VIRGINIA

/s/ Helen G. Cooper
HELEN G. COOPER
Secretary of Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 537-71-R

[Filed, Jul. 17, 1972, Clerk,
U. S. Dist. Court, Richmond, Va.]

JOHN R. DILLARD, etc., PLAINTIFF,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, THOMAS P. HARWOOD, JR., Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY, DEFENDANTS

OPINION

Plaintiff brings this action on behalf of himself and all other persons similarly situated, challenging the constitutionality of a Rule of the Industrial Commission of Virginia (Commission). He asserts the Commission approved a memorandum of agreement entered into between Aetna Casualty & Surety Company (Aetna), insurance carrier for Roanoke Mills, Incorporated, and himself, for the payment of a weekly sum beginning March 23, 1971, and to continue during his incapacity, with medical benefits. Thereafter, Aetna filed a petition with the Commission asserting a change of condition and ceased payment on and after the date of the filing of the petition. It subsequently resumed payment.

The limited issue before the Court is whether Rule 13 of the Rules of the Commission violates plaintiff's [and the class he purports to represent] rights to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff asserts that the Rule permits the termination of the payment of benefits by an employer or insurer, on the ground of a change

in the condition of the employee, prior to a full hearing on the merits by the Commission.

The Virginia Workmen's Compensation Act, Title 65.1 of the Code of Virginia, 1950, as amended, Volume 9, was enacted in 1968, Chapter 660 Acts of Assembly of 1968, to take effect October 1, 1968. It was a rewrite and revision of former Title 65. The first Workmen's Compensation Act of Virginia was adopted by the Legislature in 1918, Acts of Assembly of 1918, Chapter 400, page 640. It was modeled after and followed the Act adopted by the State of Indiana.

Pursuant to the Act, compensation is paid for all workmen coming within the provisions of the Act if injured during the course of their employment. The Act provides a system where employer and employee may escape personal injury litigation, and provides for the payment of compensation under fixed rules. It was a substitute of more certain and broader remedies for the previously existing inadequate common law rights and remedies, regardless of fault or negligence. The doctrines of contributory negligence, assumption of risk, fellow servant, and similar defenses, which frequently defeated recoveries and occupied the time of litigants and the courts, were abolished. The advantages are shared by the employer and employee. Damages resulting from an accident are treated as a part of the expense of operating the business. The Act, in effect, read into every contract of employment, within the provisions of the Act, the obligation of the employer to pay the employee for injuries. It provided an exclusive remedy in the field of industrial accidents, leaving the common law remedies to those incidents not covered by the Act.

A proceeding under the Act is not one for damages for a wrong done, but to obtain compensation for a loss sustained by reason of injury and disability. The employer's liability is not based upon tort, the rules of the common law for tort actions do not apply, and the rules of evidence are "so laxly" enforced that an award may be made on hearsay evidence alone if credible and not contradicted. *Glassco* v. *Glassco*, 195 Va. 239, 77 S.E.2d 843; *Burlington Mills Corporation* v. *Hagood*, 177 Va.

204, 13 S.E.2d 291; *Humphries* v. *Boxley Brothers Co.*, 146 Va. 91, 135 S.E. 890.

Workmen's Compensation benefits are not mandatory for the employee. By notice he may exempt himself from the terms of the Act and retain his common law rights. No such right exists for the employer. Virginia Code 65.1-23, etc.

The Commission, operating within the general legislative framework, and having both regulatory and judicial functions, is charged with the administration of the Act. When an employee is injured, he may enter into a "Memorandum of Agreement" with his employer or the employer's insurance carrier, stipulating the right to compensation, the average weekly wages, the amount of compensation, and the period of payment. The memorandum is then submitted to the Industrial Commission for approval. This was the procedure followed in the case at bar. If an agreement is not approved, or if the parties have not been able to agree, the matter is heard and determined by the Commission. Enforcement of the award is not with the Commission, but vested in a court of record of Virginia. Virginia Code Section 65.1-100.[1]

A review of an award may be had upon motion of the Commission or of any party in interest "on the ground of a change in condition." Virginia Code Section 65.1-99. Upon such review, the Commission may increase or decrease the compensation previously awarded, but no such review "shall affect such award as regards any money paid." Virginia Code 65.1-99.

Prior to the enactment of Rule 13 of the Commission, there was no provision in the Act or Rules to prevent an employer or insurer from ceasing payment of benefits at any time, asserting a change in condition, and either petitioning for an amendment or correction of the

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[1] Section 65.1-100 provides that any interested party may file in a court of record a copy of the memorandum of agreement approved by the Commission, or its order or decision, or its award, and the court shall render judgment in accordance therewith and notify the parties. Such judgment has the same effect as any other judgment rendered in that court. Such is the way for enforcement.

award, or waiting for the employee to proceed with action.[2]

To prevent the insurer or employer from following such procedure, the Commission, utilizing the authority granted by the Act—Virginia Code Title 65.1-17—enacted Rule 13, recently amended, which provides:

> Applications for Review on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.
>
> All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which con-*

[2] In such event the employee could petition the Commission for an amendment of the award as provided in § 65.1-99, or proceed with enforcement of his existing award under the provisions of Virginia Code § 65.1-100.

stitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later.

NOTE: The underlined portion represents the language of the amendment which became effective April 1, 1972.

Neither the statute, nor the Rule enacted, make any provision for the employer or insurer to cease payments. They merely provide that upon a change in condition the Commission may review any prior award and make a new award ending, diminishing or increasing the compensation previously awarded. The statute makes no grant to the Commission to stop an award previously granted prior to a review by the Commission. Rule 13, enacted by the Commission, sets forth the procedure to be followed upon the filing of a petition alleging a "change in condition." In effect, it provides the application for review (a) must be in writing, under oath, and state the grounds for relief, (b) the review will be determined as of the date of the filing of the application, (c) it must show the date through which compensation has been paid, (d) no application will be considered until compensation has been paid to the date of the filing, and (e) the application shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award has been reviewed by the Commission, and a determination made that probable cause exists to believe that a change in condition has occurred. An exception exists where an employee (a) has returned to work, or (b) has refused employment, medical attention or medical examination.

Nowhere in the Rule does it authorize or direct the employer or insurer to cease payments before a full hearing. It merely provides the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of probable cause is made, the application will then be deemed filed. Here again, it does not authorize or direct suspension of payments, but merely provides the insurer or employer may not have a hearing on an alleged change of condition unless and until the provisions of the Rule are complied with. The determination of "probable cause" is to be made from an examination of "supporting evidence which constitutes a legal basis" for changing the existing award. Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. *Lindsey* v. *Normet*, 405 U.S. 56, 65. The amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred. As pointed out above, any payments made prior to the filing of the petition and prior to the Commission's authorizing a change of the award are not recoverable by the employer or insurer. Virginia Code Section 65.1-99. To discourage unwarranted applications for cessation of payments or other abuses, the Act provides that if employer or insurer bring, prosecute or defend any proceeding without reasonable grounds, the Commission or court may assess them with all of the costs, including a reasonable attorney's fee for any counsel appearing for the employee. Virginia Code Section 65.1-101.

It must be kept in mind that the award is for a stipulated sum per week "during incapacity." It is not an unlimited award. When incapacity ceases, the award ceases to exist.

Plaintiff's attack upon the Rule [3] is that it authorizes the insurer or employer to cease payments without meeting the requirements of due process. He says it permits a change in the award without the holding of a full-scale hearing at which he may be permitted to present evidence and contest any contentions made by the insurer or employer. Plaintiff makes no contention that he is denied the opportunity of a full-scale hearing with the assistance of counsel, when the application for a review is heard by the Commission.

The average time between the filing of an application for a review of the award on an alleged change in condition and the full-scale hearing by the Commission is one month. But even assuming that the Rule does not provide for notice and a hearing to the employee prior to termination of the award, and that the Rule is authority for the employer or insurer to terminate payments, under the facts and circumstances in this case the State function involved does not constitute a denial of due process. A full due process hearing is provided with the right of appeal to the highest court of the State and any determination favorable to the employee results in full retroactive payments.

The very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation. As early as *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 707-708, the Court said "that by due process is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected." Numerous definitions have been given of due process varying from that set forth in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162-163, saying it represents "a profound attitude of fairness between man and man, and more particularly between the

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[3] He makes no attack upon the language of the statute, but only the Rule enacted by the Commission.

individual and government . . . ," to saying, as was done in *Hannah* v. *Larche*, 363 U.S. 420, 442, that it "embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." In *Bowles* v. *Willingham*, 321 U.S. 503, dealing with administrative action, the Court at page 520 said:

> To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in *Yakus* v. *United States*, *supra*, that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States*, 102 U.S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U.S. 611, 631.

As was pointed out in *Torres* v. *New York State Department of Labor*, 321 F.Supp. 432 (S.D. N.Y. 1971)[4], at page 437:

> The concept of due process does not involve a set of fixed, unalterable principles. "[C]onsideration of what procedures due process may require under any give set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the public interest that has been affected by Governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230

[4] Cert. denied 405 U.S. 949.

(1961). See Goldberg v. Kelly, supra, 397 U.S. at 263, 90 S.Ct. 1011, at 1018.

The touchstones in the area of procedural due process and the test of whether one has been afforded due process is one of fundamental fairness and reasonableness in the light of the total circumstances. *Anti-Fascist Committee* v. *McGrath, supra; Whitfield* v. *Simpson*, 312 F.Supp. 889 (E.D. Ill. 1970); *Sigma Chi Fraternity* v. *Regents of University of Colorado*, 285 F.Supp. 515 (D.C. Cal. 1966); *Due* v. *Florida A & M*, 323 F.Supp. 296 (D.C. Fla. 1963).

The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the request hearing is held before the final order becomes effective. *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710; *Bowles* v. *Willingham*, 321 U.S. 503, 519-521; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152-153.

The payment of sums awarded under the Workmen's Compensation Act is entirely different from payment of welfare. As was pointed out in *Torres* v. *New York State Department of Labor, supra*, Workmen's Compensation payments like unemployment compensation differ from relief in that each are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. They are based on wages previously received and are completely unrelated to need. [321 F. Supp. 437].

This is not a case of "brutal need" or "overpowering need" which existed in *Goldberg* v. *Kelly*, 397 U.S. 254. The Court pointed out in the *Torres* case, an employee cut off from Workmen's Compensation "may qualify for welfare payments, if he can show the requisite need. Thus the worst possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief.

If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." Here, unlike in *Torres* where there was a right to recover back any sums improperly paid, no such right exists under the Workmen's Compensation Act. In addition, the Commission may assess all of the costs, including a reasonable attorney's fee for employee's counsel, against an insurer or employer who brings any such proceeding without reasonable grounds.

The award is during incapacity. When incapacity ceases, the award ceases. Let us suppose there was an award for the lifetime of the injured. To be sure, due process does not mean the award could not be terminated upon the death of the employee without a full-scale hearing. Under the award, when the employee regains capacity the award terminates. If plaintiff's contentions are correct, if an employee regains capacity to return to employment, or even if he obtains other employment, employer or insurer could not stop payments under the award until there was notice and an opportunity for him to be heard. Payments made between the time of his regaining capacity are not recoverable by the employer or insurer. As the Court pointed out in *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895, due process does not require a trial-type hearing in every conceivable case of government impairment of private interest, nor where an official may have abused his discretion. "It is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597; *Bowles* v. *Willingham*, 321 U.S. 503, 520; *Yakus* v. *United States*, 321 U.S. 414, 442-443.

Plaintiff attempts to equate Workmen's Compensation payments with welfare benefits and affix to each of them a label of "brutal need." But, as the Court pointed out in *Richardson* v. *Belcher*, 404 U.S. 78, 83, discrimination "between two like classes cannot be rationalized by assigning them different labels, but neither can two unlike

classes be made indistinguishable by attaching to them a common label." *Torres* held "brutal need" could not be equated with Unemployment Compensation. Neither can it be equated with Workmen's Compensation.

The situation here is much like that referred to in Mr. Justice Black's dissent, joined in by Chief Justice Burger, in *Goldberg* [397 U.S. 254, 277] where one party owing another money ceases payment. The payee has a right of action against payor, but there is no provision in law that before payor ceases payments, he must give notice and an evidentiary hearing be held. Here employee has an award of weekly compensation by agreement between the parties, approved by the Industrial Commission, to continue during incapacity. Power of enforcement is not in the Commission. The Commission can order payment, but cannot enforce it. Enforcement is with a court of record. Requesting a hearing on an alleged change of condition, and the fixing of a time for it, do not invalidate or change the award. Employee can still proceed with the same action for collection which he would take if the employer or insurer merely ceased payments without asserting any change in condition or making a request for a hearing.

For the reasons hereinabove stated, the complaint and this action are dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 537-71-R

JOHN R. DILLARD

v.

INDUSTRIAL COMMISSION OF VIRGINIA, et al

MERHIGE, J.—Dissenting

Because I conclude that my fellow judges have this day by their conclusions permitted the continued violation of constitutional rights of the plaintiff and the class which he represents, I must respectfully dissent from their views.

The matter comes before the Court without benefit of an evidentiary hearing. Nevertheless the pleadings, the answers to the interrogatories, the stipulations entered into between the parties, and the admissions at the bar of the Court during argument in this cause, in my opinion, establishes the following:

This is an appropriate class action and the named planitiff is representative of that class of persons who, upon sustaining an injury while in the course of their employment, are recipients of workmen's compensation benefits in accordance with the provisions of Virginia's Compensation Act, Title 65, Code of Virginia, as amended. Rule 23 F.R.C.P.

The named plaintiff sustained an injury which entitled him to Workmen's Compensation payments in the amount of $40.80 per week commencing on March 23, 1971, as evidenced by a Memorandum of Agreement entered into between the plaintiff and the defendant insurance company acting in place of his employer, and approved by the Industrial Commission of Virginia on March 30, 1971. Within less than three months thereafter these payments were discontinued by reason of Aetna having

filed an application for hearing before the Industrial Commission of Virginia, alleging that plaintiff had undergone a change in condition and was physically capable of resuming his employment. Approximately seven weeks thereafter a finding of the Commission resulted in plaintiff receiving the suspended payments and the continuation of same on a weekly basis. Within less than a month of a finding by the Commission that Dillard was entitled to the accrued compensation and a resumption of the directed compensation, Aetna once again filed an application for hearing alleging a change of condition, and payments once again were suspended and remained so until, upon agreement of Aetna and Dillard, the application for hearing was dismissed and compensation resumed.

The twice accomplished cessation of compensation was based upon the then existing Rule 13 of the defendant Commission, promulgated in accordance with § 65.1-18 of the Code of Virginia (1940).[1] The majority has set out the rule in toto which, as stated by the majority, was amended effective April 2, 1972, by adding the following sentence:

> All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.

It is this rule which is under constitutional attack as allegedly violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

My colleagues suggest that the amendment to the rule was brought about to preclude the cessation of payment of benefits upon an assertion by an employer of a change in condition, and they suggest that neither the statutory

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[1] This section permits the Commission to promulgate rules not inconsistent with Act for carrying out its provisions.

scheme nor the amended rule "make any provision for the employer or insurer to cease payments." A reading of the rule clearly shows a contemplation that the benefits will be suspended upon compliance with the rule prior to the workman being given any opportunity to be heard or indeed even be advised that an application by his employer or insurer had been filed. The Industrial Commission itself, in its motion for summary judgment, describes the effect of Rule 13 as to "require that an *ex parte* inquiry be held by the Commission to determine whether probable cause exists for a change in the award before any benefits may be temporarily suspended pending a full hearing . . ."

Much is stated in the majority opinion as to what the rule allegedly does not do; the material fact, however, is that what it does do is to deprive the plaintiff and the members of his class of a property right without due process of law.

The Legislature of Virginia intended to make the Act exclusive in the industrial field, so that in the event of an accident the rights of all those so engaged would be governed solely thereby.

As pointed out by the majority, under the Act both employer and employee surrender former rights and gain certain advantages. Under the Act there is read into every contract of employment within the purview of the Act the obligation of an employer to pay specified compensation for injury to an employee arising out of his employment, and for an employee in consideration thereof to forego certain of his common law remedies.[2]

A provision seldom invoked permits an employee prior to an accident to give notice of his intention not to be covered by the Act. The answers to the interrogatories fail to indicate the total number of covered employees in the State, but do indicate that approximately 900 employees of a total of 75,919 employers chose to do so in 1971.

The Legislature of Virginia has accorded to the Industrial Commission, the promulgators of the rule in ques-

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[2] *Feitig* v. *Chalkley*, 185 Va. 96, 38 S.E. 2d 73 (1946); *Fauver* v. *Bell*, 192 Va. 518, 65 S.E. 2d 575 (1951).

tion, the power to enforce the attendance of parties in interest and witnesses, as well as the production and examination of books, etc.

While the majority declares the questioned rule not to be violative of the constitutional right of due process, they describe the matter as one "wherein one party owing another money ceases payment. The payee has a right of action against payor, but there is no provision in law that before payor ceases payments he must give notice and an evidentiary hearing be held." (Majority opinion, p. 16).

If the suggestion be that the Fourteenth Amendment to the Constitution of the United States does not come into play by virtue of a lack of State action, even a perfunctory study of Virginia's statutory scheme as to the conduct of the parties in the field of workmen's compensation produces an inextricable and manifest enmeshment of a State agency to such a significant extent as to preclude any viable argument to the contra. We do not deal here solely with individual invasion of individual rights outside the State's responsibility under the Fourteenth Amendment. See *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) and cases cited therein.

We deal here with a statewide regulation enacted by a state-constituted commission "functioning pursuant to a statewide policy and performing a state function." *Moody* v. *Flowers*, 387 U.S. 97, 102, 87 S.Ct. 1544, 1548 (1967); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970).

It appears to me that the majority puts much too much stress on the fact that an aggrieved workman ultimately receives a hearing. While it is quite true that the answers to the interrogatories indicate that the average time between the filing of an application for review of the award on alleged change in condition and the hearing by the Commission is one month, the same answers indicate that the time between an application for review and a hearing on any disagreement as to the continuance of weekly payments after same has been approvd can run anywhere from one to eight months.

It is a basic principle of due process that an individual be given an opportunity for a hearing at a meaningful time and in a meaningful manner. In addition, the hearing must be appropriate to the nature of the case. See *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 82 S.Ct. 1187, 1191 (1965); *Mullone* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657 (1949). Except for extraordinary situations where some valid governmental interest is at stake, there is no justification for the postponement of a hearing until after the event has transpired. See *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1970).

I have searched in vain for a mention in the majority opinion as to what governmental interest is so important as to outweigh the rights of the plaintiff class to avoid loss prior to procedural due process, for the extent to which procedural due process must be afforded is influenced by the extent to which one may be condemned to suffer grievous loss. The United States Supreme Court has consistently stated that in consideration of what procedures due process may require under any given set of circumstances, one must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. See *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1969). The governmental concern which prompted the enactment of Virginia's Workmen's Compensation laws has been referred to time and time again by the Supreme Court of Appeals of Virginia. One of the primary purposes is to protect the employee so as to provide compensation to him for the loss of his opportunity to engage in work when his disability is occasioned by an injury suffered from an accident arising out of and in the course of his employment. The Act itself is to be liberally construed in harmony with its humane purposes. See *Burlington Mills Corp.* v. *Hagood*, 177 Va. 204, 13 S.E. 2d 291 (1941); *Rust Engineering Co.* v. *Ramsay*, 194 Va. 975, 76 S.E. 2d 195 (1953). Indeed the Legislature of Virginia was so concerned with the humane purposes of its Act that even an agreement reached between an employee and an employer may be approved only when

the Industrial Commission, or any member thereof, is clearly of the opinion that the best interests of the employee—will be served thereby. See Virginia Code § 65.1-93, as amended.

While the majority makes no mention of the precise nature of the governmental function or interest involved, it was suggested during argument that the giving of notice and a prior hearing would result in the need for additional employees to be retained by the defendant Commission. The answer is simple—such a statement is not supported by the evidence, and even if it could be the constitutional requirement of due process was in particular designed to protect the particular interest of the person whose rights are being affected, and was never intended to promote efficiency or to accommodate all possible interests. See *Goldberg* v. *Kelly, supra.* See also, *Funtes* v. *Shevin, et al,* 40 U.S.L.W. 4692, note 22 (June 12, 1972).

It would seem that, if anything, governmental interests would be promoted by affording recipients of workmen's compensation their pre-termination evidentiary hearing, or at the very least an opportunity to submit documentary evidence prior to any cessation of benefits to which it has been adjudicated by the Commission they are entitled. The fact that the law of Virginia precludes any recovery of any payments made by an employer, to me simply points up the concern the Legislature had for the injured employee.

It is suggested that "the worst possible effect of the instant procedure would be that for a period of a few weeks until a hearing is held, a claimant who is finally determined to be eligible for payments would have to live on his accumulated savings or, if he had no savings, would have to resort to relief."[3] While there is no evidence to support any such supposition, the few weeks referred to by the majority insofar as the named plaintiff is concerned stretched into seven before the Commission made a finding resulting in the resumption of weekly

[3] This language was adopted by the majority from the language of the Court in *Torres* v. *New York State Dept. of Labor,* 321 F. Supp. 432, 437.

payments. The very suggestion that a member of the plaintiff class would have to resort to relief appears to me to point up that the governmental interest involved would be better served by the simple practice of giving notice and affording a hearing prior to cessation of benefits.

Judges need not blind themselves to what they know as men. I cannot help but believe that the average working man in Virginia, who has sustained an injury resulting in a substantial reduction of his weekly income, suffers a grave and immediate loss. The cessation of delivery of what may well be the necessities of life to a working man with a family is seldom preceeded by any degree of formality. Where no valid State interest is involved, a court of all our institutions ought not be a party, even peripherally, by approving what on its face is manifestly unfair. It should be constantly kept in mind that the situation to which the plaintiff class addresses itself only arises subsequent to a determination that the particular member of the plaintiff class has been injured in his work and is entitled to compensation. I can think of no reason why notice and a hearing should not be given to the very person whom the Industrial Commission, by its approval of the original agreement for compensation, has found entitled to same under the law. The very thought that the *ex parte* proceeding permitted by Rule 13 may result in a cessation of milk delivery, or electric power, or fuel to a working man and his family, shocks my conscience.

I have no doubt that this is a case of "brutal need" similar to that in *Goldberg* v. *Kelly*, *supra*, yet I must say that the burden of showing such is, in my opinion, not necessary to find the rule in question violative of the Constitution. In *Fuentes* v. *Shevin*, *supra*, Mr. Justice Stewart succinctly points out that the Court's conclusions in *Goldberg* in no way marked a departure from established principles of procedural due process. *Goldberg* and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, simply re-establish what has always been the law to the effect that due process requires an opportunity for a hearing before a deprivation of property takes effect. While, as Mr. Justice Stewart points out, the primary

issue in *Goldberg* was the form of hearing demanded by due process before determination of welfare benefits, hence the importance of welfare was directly relevant to that question just as in our instant case the relative weight of the claimant class' property interest is relevant to the formal notice and hearing which I believe is required by due process.

We deal here with established rights. Recipients of workmen's compensation are not beneficiaries of a handout. They are entitled to the funds they receive. Indeed the United States Supreme Court has held unconstitutional a determination by a State to suspend one's driver's license prior to notice and hearing. See *Bell* v. *Burson*, 402 U.S. 535 (1970).

One further comment on the majority's suggestion that the rule is drafted in such a way as to discourage unwarranted applications for cessation of payments by reason of that portion of the rule which permits the assessment of costs and unreasonable attorneys' fees against an employer. That portion of the rule does not come into effect until costs and attorneys' fees have been incurred by virtue of defending a proceeding "without reasonable grounds." It seems to me while the theory may sound well, as a practical matter it is useless. In the first place a workmen's compensation recipient, as it now stands under the rule, would not even know an application had been filed for cessation of his payments unless and until that fact occurred, and by that time the Commission has already, pursuant to its rule, found probable cause, which I believe can reasonably be interpreted as reasonable grounds. I can hardly see the threat of assessment of attorneys' fees or costs being of any consequence in the instant situation.

I respectfully suggest that my colleagues' dependence on *Torres* v. *New York States Dept. of Labor*, *supra*, n. 3, is misplaced, for first, that Court dealt with a prospective loss of government funds, whereas in our instant case no State funds are involved at all; and, in addition, the claimant made a weekly report to the State office. Provision was also made for one to be interviewed with respect to any new information which might affect his

eligibility for unemployment compensation. In our instant case a claimant is given no opportunity to be heard until after the fact. The *Torres* Court, finding an absence of "brutal need" which it interpreted as the basis for decision in *Goldberg, supra,* found that the governmental interest involved in its case outweighed plaintiff's claim. While I conclude from *Fuentes, supra,* that a reliance on a "brutal need" standard is misplaced, as I have endeavored to point out heretofore, the majority, while finding no brutal need situation in our instant case, conspicuously refrains from any reference to a superior governmental interest, a factor which I deem to be required.

Due process requires both notice and hearing prior to the deprivation of a right. Any exception can be justified only by reason of a State interest so strong as to permit a deviation from the requirement. Such a situation is not present in the instant case and no rationalization can make it so. The majority's actions cannot be justified on the ground that the members of plaintiff's class will ultimately receive notice and a hearing, for no court has ever adopted the general proposition that a wrong may be done simply because it can be undone.

I respectfully record my dissent.

/s/ Merhige
United States District Judge

Date: July 17, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 537-71-R

JOHN R. DILLARD, ETC., PLAINTIFF

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, THOMAS P. HARWOOD, JR., Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY, DEFENDANTS

FINAL ORDER

For the reasons stated in the opinion of the Court this day filed,

It is ADJUDGED and ORDERED that the complaint and this action are dismissed.

Let the Clerk send copies of this order and the opinion to counsel of record.

/s/ [Illegible]
United States Circuit Judge

/s/ [Illegible]
United States Circuit Judge

/s/ [Illegible]
United States District Judge

July 17, 1972.

SUPREME COURT OF THE UNITED STATES

JOHN R. DILLARD, ETC.

v.

INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 72-5411. Decided December 11, 1972

PER CURIAM.

Appellant brought a class action to challenge the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. He appealed an adverse judgment, but his jurisdictional statement states that after the decision below "an Order was entered by the Commission approving a lump-sum settlement of $4,243.20 in full settlement of [his] individual claim for compensation for his injury which occurred on March 15, 1971."

In this state of the record, the motion to proceed *in forma pauperis* is granted, the judgment vacated and the case remanded to the United States District Court for the Eastern District of Virginia to consider whether this case is moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

(Title omitted in printing)

MOTION TO INTERVENE AS PLAINTIFF

1. Willie Williams moves for leave to intervene as a plaintiff in this action in order to assert his claim under the complaint and motions heretofore filed by the plaintiff.

2. Applicant, Willie Williams, is a citizen of the United States, and a resident of Richmond, Virginia. He is the sole support of his wife and seven minor children. Applicant and his family's sole income is $238.00 per month from Social Security benefits, and, prior to October 10, 1972, $55.92 per week workmen's compensation benefits; and since the termination of said benefits, applicant has been working part-time.

3. Applicant on or about April 14, 1972 had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia, approved an award of $55.92 per week, during incapacity, beginning on April 15, 1972.

4. On or about October 10, 1972, The Travelers Insurance Company, which, upon information and belief, is an insurer with authorization to transact the business of workmen's compensation insurance in the State of Virginia, pursuant to Sections 65.1-103 *et. seq.* of the Code of Virginia, as amended, sent to Applicant a form stating that his benefits were being terminated on October 11, 1972. Said form was accompanied by an Agreed Statement of Fact form, which was supposed to be signed by the Applicant.

5. The Applicant did not sign the Agreed Statement of Fact form, but was not paid any compensation after October 10, 1972.

Upon information and belief, on or about October 13, 1972, the defendant, Industrial Commission of Virginia, reviewed the Application for hearing and made an *ex parte* determination that "probable cause exists to believe

that a change in condition has occurred", pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, as amended.

7. On or about December 2, 1972 the Applicant received a Notice of Hearing informing him that a hearing would be held on December 15, 1972, on the question of a change in his physical condition.

8. A hearing was held on December 15, 1972, at which evidence was presented, and further medical evidence was ordered by the Industrial Commission to be obtained.

9. Since October 10, 1972 the Applicant has received no workmen's compensation benefits.

10. The termination of Applicant's workmen's compensation benefits has caused and will continue to cause he and his family extreme and irreparable hardship, suffering and damage.

11. Applicant adopts the allegations in paragraphs numbered 1 through 2, 5 through 6 and 15, and prayers numbered 2 through 5 contained in the complaint filed by the plaintiff.

12. Applicant is a member of the class of persons represented by the plaintiff in this suit.

WHEREFORE, applicant moves pursuant to Rules 23 (d) and 24 of the Federal Rules of Civil Procedure for leave to intervene as a plaintiff in this action.

Respectfully submitted,

WILLIE WILLIAMS

By /s/ George S. Newman
GEORGE S. NEWMAN,
Counsel

NEIGHBORHOOD LEGAL AID SOCIETY, INC.
P.O. Box 417
Richmond, Virginia 23203

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

PROPOSED COMPLAINT

1. This is an action for a preliminary and permanent injunction, and damages authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution of the United States. The rights, privileges and immunities for which redress is sought are those secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This is also an action for a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, to declare the rights established by the aforementioned constitutional provision.

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343 (3) and (4), providing for original jurisdiction of this Court in suits authorized by 42 U.S.C. § 1983; jurisdiction is further conferred on this Court by 28 U.S.C. §§ 2201 and 2202 relating to declaratory judgments, and by 28 U.S.C. §§ 2281 and 2284 providing for a three-judge district court.

3. Applicant, Willie Williams, is a citizen of the United States and a resident of Richmond, Virginia.

4. Applicant brings this action on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a) (b) (2) of the Federal Rules of Civil Procedure. The class which applicant represents is all persons similarly situated who are or will be recipients of Workmen's Compensation pursuant to the Virginia Workmen's Compensation Act (Title 65, Code of Virginia, as amended) and who are or will be, therefore, subject to having their benefits terminated prior to a hearing before the Industrial Commission of Virginia. The members of the class on behalf of whom applicant sues are so numerous as to make joinder impracticable. There are

questions of law or fact common to all members of the class, since applicant challenges the validity of a rule or regulation which is alleged to be applied uniformly to all members of the class on grounds available to all members of the class; to wit, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The claims of the applicant are typical of the claims of the members of the class. The applicant will fairly and adequately protect the interest of the members of the class.

5. Defendant Thomas M. Miller is the chairman of the Industrial Commission of Virginia. Defendants M. Edward Evans, and Thomas P. Harwood, Jr., are the other members of said Commission. The Defendant, Industrial Commission of Virginia, is empowered, under Section 65.1-18 of the Code of Virginia, as amended, to make rules for carrying out the purposes of the Virginia Workmen's Compensation Act, including the Rule herein complained of.

6. Applicant on or about April 14, 1972 had an accident arising out of and in the course of his employment. The defendant, Industrial Commission of Virginia, approved an award of $55.92 per week, during incapacity, beginning on April 15, 1972.

7. On or about October 10, 1972, The Travelers Insurance Company, which, upon information and belief, is an insurer with authorization to transact the business of workmen's compensation insurance in the State of Virginia, pursuant to Sections 65.1-103 *et. seq.* of the Code of Virginia, as amended, sent to Applicant a form (a copy of which is attached as Exhibit A) stating that his benefits were being terminated on October 11, 1972. Said form was accompanied by an Agreed Statement of Fact form, which was supposed to be signed by the Applicant.

8. The Applicant did not sign the Agreed Statement of Fact form, but was not paid any compensation after October 10, 1972.

9. Upon information and belief, on or about October 13, 1972, the defendant, Industrial Commission of Virginia, reviewed the Application for hearing (Exhibit A) and made an *ex parte* determination that "probable cause

exists to believe that a change in condition has occurred", pursuant to Rule 13 of the Rules of the Industrial Commission of Virginia, as amended.

10. On or about December 2, 1972 the Applicant received a Notice of Hearing (a copy of which is attached as Exhibit B), informing him that a hearing would be held on December 15, 1972, on the question of a change in his physical condition.

11. A hearing was held on December 15, 1972, at which evidence was presented, and further medical evidence was ordered by the Industrial Commission to be obtained.

12. Since October 10, 1972 the Applicant has received no workmen's compensation benefits.

13. The termination of Applicant's workmen's compensation benefits has caused and will continue to cause he and his family extreme and irreparable hardship, suffering and damage.

14. Rule 13 of the Rules of the Industrial Commission of Virginia, as amended, violates applicant's, and the class he represents, rights to Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said Rule allows workmen's compensation benefits to be discontinued on the grounds of a change in condition, without giving the injured worker notice and the opportunity of having a prior evidentiary hearing.

WHEREFORE, Applicant, on his own behalf, and on behalf of all others similarly situated, respectfully prays that this Court:

1. Assume jurisdiction of this cause, convene a three-judge district court to determine this controversy, and set this cause down for a hearing.

2. Issue an Order certifying that this is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

3. Enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring that Rule 13 of the Rules of the Industrial Commission of Virginia, as amended, violates and is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United

States in that said Rule allow[s the termination of work-]
men's compensation benefits v[without notice and the op-]
portunity of a prior evidentia[ry hearing.]

4. Enter a preliminary inj[unction pending the final]
determination of this matter, a[nd thereafter, a permanent]
injunction, prohibiting restrai[ning and enjoining defend-]
ants, their successors in office, [agents and employees from]
allowing the termination of wo[rkmen's compensation ben-]
efits without notice and the o[pportunity for a prior evi-]
dentiary hearing.

5. Issue an Order directing [the defendants to order the]
insurance carrier, The Trav[elers Insurance Company,]
to reinstate the applicant's wo[rkmen's compensation bene-]
fits retroactively to October 10[, 1972, and to continue said]
benefits until a decision is rea[ched in a due process hear-]
ing finding him ineligible for [such benefits.]

6. Grant applicant his costs [herein and any additional]
or alternative relief as the C[ourt may deem to be just]
and appropriate.

Re[spectfully submitted,]

/s/ Wi[llie Williams]
W[ILLIE WILLIAMS]

/s/ GEORGE S. NEWMAN [ID]
NEIGHBORHOOD LEGAL AI[03]
SOCIETY, INC.
P.O. Box 417
Richmond, Virginia 2320
643-0218
Counsel for Applicant
By: George S. Newman

VERIFIC[ATION]

WILLIE WILLIAMS, beir[ng duly sworn, deposes and]
says that he is the applicant [for intervention in the above]
and foregoing Proposed Cor[mplaint and that the facts]
alleged therein are true to th[e best of his knowledge and]
belief.

/s/ W[illie Williams]
W[ILLIE WILLIAMS]

[Jurat and Certificate of Se[rvice Omitted in Printing]]

THE TRAVELERS

THE TRAVELERS INSURANCE COMPANY · THE TRAVELERS INDEMNITY COMPANY

CLAIM DEPARTMENT
H. V. THORNHILL, MANAGER

RICHMOND OFFICE
3610 West Broad Street
RICHMOND, VIRGINIA 23230
Telephone: 353-9161

October 10, 1972

REVIEWED - PROBABLE CAUSE FOUND
B. Condrey 10-13-72
Name Date

Willie Williams
507 Patrick Avenue
Richmond, Va. 23222

I.C.#: 246-389
B- 512,251
Assured: Richmond Guano Co.
Re: Willie Williams

We have a report from your (~~employer~~) (doctor) stating you ~~did not~~ are able to, return to work, ~~or reached maximum improvement~~ on Oct. 9, 1972.

We are, therefore, suspending temporary disability benefits with the enclosed check paying compensation through 10-10-72 and requesting the Industrial Commission of Virginia to consider this letter as an application for a hearing should one become necessary.

Total compensation paid: $ 1,429.96 at the rate of $ 55.92 from 1-15-72 to 10-11-72.

Please sign and return the attached Agreed Statement of Fact form acknowledging the termination of your temporary disability and of our payments to date.

The attached form is not a release. Signing it does not terminate your claim. You have twelve months from the last day for which compensation is paid pursuant to an award to make application to the Industrial Commission for payment of additional benefits.

Very truly yours,

Elizabeth L. Wilhoit
~~J. Bocklet Doehling, Jr.~~
Supervisor for Richmond

Date of last payment 10-10-72
Reopen as of
Application filed 10-11-72 before
Referred to Docket 10-13-72
By bc

CC: Industrial Commission of Virginia
Post Office Box 1794
Richmond, Virginia 23214

Subscribed and sworn to by Elizabeth L. Wilhoit
Erma L. Miller N/P
10/10/72 Date

My Comm Exp 10-31-75

HOME OFFICE: HARTFORD, CONNECTICUT

EXHIBIT A

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. BOX 1794 RICHMOND, VIRGINIA 23214

(Refer to I.C. File No. in all correspondence about this injury.)

I.C. FILE NO.
246-389
CARRIER'S NO.

NOTICE OF HEARING

DATE OF ACCIDENT
April 14, 1972

RE: Willie Williams
v.
Richmond Guano Company

TO THE PARTIES ADDRESSED:

A hearing will be held at:

Industrial Commission Courtroom
Hamilton Building - 3rd Floor
Ninth and Governor Streets
Richmond, Virginia

on December 15, 1972 at 9:30 A. M.

SUBJECT OF HEARING: Insurer's letter dated October 10, 1972 requesting a hearing on the ground of change in condition.

This hearing is part of a schedule. Postponement will cause inconvenience and extra expense. Continuance is entirely within the discretion of the Commission except as otherwise provided by law.

All medical reports are to be submitted to this Commission so they can be placed in the file prior to the date of hearing. Medical reports are acceptable in lieu of physicians personal appearances.

The parties must arrange to have all witnesses present to testify at the time and place designated. Failure of any party to appear at the time and place herein prescribed will result in action by the Commission as provided by law.

770-4472
K. S. WILDIT, Deputy Commissioner
INDUSTRIAL COMMISSION OF VIRGINIA

Helen G. Cooper
Helen G. Cooper
Secretary of Commission

Claimant

Mr. Willie Williams
507 Patrick Avenue
Richmond, Virginia 23222

Employer

Richmond Guano Company
9 South Fifth Street
Richmond, Virginia 23219

Fold

Insurance Carrier

Travelers Insurance Company
3610 West Broad Street
P. O. Box 26426
Richmond, Virginia 23261

Claimant's Counsel

George Newman, Esq.
Neighborhood Legal Aid Society
10 South Tenth Street
Richmond, Virginia 23219

Defendant's Counsel

Date of this Notice 12-1-72

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

STATEMENT OF DEFENDANT INDUSTRIAL COMMISSION IN OPPOSITION TO PETITION FOR INTERVENTION

Now comes the defendant Industrial Commission of Virginia, by counsel, and in opposition to the petition for leave to intervene filed herein by Willie Williams says as follows:

1) Applicant has contended that the named plaintiff, Dillard, no longer represents the purported class because his claim has been settled. Applicant's Memorandum In Support of Intervention at 3. If this be true, defendant submits that applicant is no more a proper party or proper class representative than the plaintiff, since applicant has also received settlement of his claim. See Exhibits A and B attached hereto. Consequently, it seems unnecessary to add an additional party plaintiff where resolution of the same issues will be litigated by the original plaintiff who, if he does represent a class, adequately represents the interests of the applicant. (It may be noted that plaintiff's attorney and applicant's attorney are members of the same firm. This may explain why applicant's certificates of service do not indicate that counsel for plaintiff has received notice of his application.)

2) Applicant has failed to join the Travelers Insurance Company in his proposed Complaint. Said company is a necessary party to the relief sought by applicant, since the payments which the applicant sought to have resumed were terminated by the company, not by defendant.

3) As for applicant's complaint that his insurance carrier (Travelers) failed to comply with defendant's Rule 13 requiring it to pay benefits up to the date of filing as defined by the said rule, such matters are properly within the ambit of enforcement by the Industrial Com-

mission against the carrier rather than by this Court against the Commission.

Defendant Commission repsectfully submits, therefore, that the application for intervention should be denied.

INDUSTRIAL COMMISSION OF VIRGINIA
By: /s/ Vann H. Lefcoe

Andrew P. Miller
Attorney General
Vann H. Lefcoe
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

EXHIBIT A

THURMOND, BEAVER & BOSTWICK

ATTORNEYS AT LAW

Suite 495, Seaboard Bldg.
3600 W. Broad St.
Richmond, Virginia 23230

Lanier Thurmond
Robert P. Beaver
Edgar I. Bostwick

Telephone
Area Code 703
355-5731

February 7, 1973

George S. Newman, Esquire
Neighborhood Legal Aid Society, Inc.
10 South 10th Street
Richmond, Virginia 23219

I. C. No. 246-389

Re: Willie Williams vs. Richmond Guano Company
Our File No. T72-692

Dear Mr. Newman:

Enclosed are drafts covering the total disability period from October 11, 1972 to January 18, 1973, which is the date of Dr. Herman Nachman's report and the date to which we agreed to pay total disability. Also enclosed is a check paying partial disability benefits from January 10, 1973 to February 8, 1973. The partial disability benefits will be continued so long as Mr. Williams qualifies under the terms of the Virginia Workmen's Compensation Act.

These drafts are submitted with the understanding that your client will execute the agreed statement of facts in the space provided. This should be returned so that it can be submitted to the Industrial Commission to bring the matter up to date. Please see that Mr. Williams' signature is witnessed. This form should be returned to me.

These drafts and the agreed statement of facts and supplemental agreement are in accordance with the agreement you and I had to bring this matter to a conclusion.

If, for any reason, you have any questions on this matter, please be good enough to call me.

Very truly yours,

/s/ Edgar I. Bostwick
EDGAR I. BOSTWICK

EIB:kh
Enclosures
cc: Commissioner Thomas M. Miller
cc: Mr. J. J. Boehling, Jr.

EXHIBIT B

THURMOND, BEAVER & BOSTWICK

ATTORNEYS AT LAW

Suite 495, Seaboard Bldg.
3600 W. Broad St.
Richmond, Virginia 23230

Lanier Thurmond
Robert P. Beaver
Edgar I. Bostwick

Telephone
Area Code 703
355-5731

February 1, 1973

Mr. J. J. Boehling, Jr.
Supervisor, Claim Department
Travelers Insurance Company
3610 West Broad Street
Richmond, Virginia 23230

Re: Willie Williams vs. Richmond Guano Company
146 CB 5124252
Attorney's File No. T72-692

Dear Joe:

Mr. George S. Newman, Attorney, and myself have agreed on a disposition of this case, and under the agreement, the Travelers is to pay total disability benefits to January 18, 1973, which is the date of Dr. Herman Nachman's report of examination.

After that, it is agreed that partial disability benefits will be paid within the statutory limits or until the claimant is physically able to resume full employment.

Under the evidence presented at the hearing, he stated that his average wage at the present time was $65.00 per week, and at the time he was employed by the Richmond Guano Company, his average wage was $93.20 per week, which makes a difference of $28.20, so that he would be due $16.92 per week under partial disability benefits.

It appears that it would expedite the matter if you would send the necessary agreements to Mr. Newman so that can be executed and submitted to the Commission and payments can be made accordingly.

Sincerely yours,

/s/ Edgar I. Bostwick
EDGAR I. BOSTWICK

EIB:kh
cc: George S. Newman, Esquire
cc: Commissioner K. S. Wilhoit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title Omitted in Printing]

SUPPLEMENT TO DEFENDANTS' STATEMENT
IN OPPOSITION TO INTERVENTION

Now comes the defendant Industrial Commission of Virginia, by counsel, and asks that the Agreed Statement of Facts and Supplemental Memorandum of Agreement filed herewith be made Exhibit C to their Statement In Opposition hereinbefore filed.

INDUSTRIAL COMMISSION OF
VIRGINIA, et als.

By: /s/ Vann H. Lefcoe
Counsel

Vann H. Lefcoe
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF WORKMEN'S COMPENSATION
INDUSTRIAL COMMISSION OF VIRGINIA
P. O. Box 1794
Richmond, Virginia 23214

WILLIE WILLIAMS, EMPLOYEE
and
RICHMOND GUANO COMPANY, EMPLOYER

Claim Number 146 CB 5124251
246-389

Date of Accident 4-14-72

AGREED STATEMENT OF FACT

It is agreed that the employee (returned to work) on January 18, 1973, at an average weekly wage of $65.00. The outstanding award is terminated on the above date subject to approval by the Industrial Commission. The employee may reopen the claim pursuant to § 65.1-99. SEE NOTE BELOW

Date of Agreement 2/12/73

TRAVELERS INS. CO.
Employer or Insurer

By: /s/ [Illegible]

/s/ Willie Williams
Employee

/s/ GEORGE S. NEWMAN
Witness to Employee's Signature

Total compensation paid $2220.84 at $52.92 per week from 4-15-72 through 1-17-73. Medical Expense $ ..... .

NOTE: The signing of the above agreement is not a requirement for payment. This agreement is neither a receipt for money nor a release of claim. Should further disability result, the claim can be reopened by written application received by the Industrial Commission within twelve months from the late date for which compensation was paid; however, at a hearing on the application, compensation cannot begin more than 14 days prior to the date of filing.

SUPPLEMENTAL MEMORANDUM OF AGREEMENT

It is agreed that on January 18, 1973, the employee ..... OR had a change in average weekly wage of $93.20 to $65.00.

It is further agreed that compensation will be paid and accepted beginning January 18, 1973, at the rate of $16.92 per week to continue for so long as partially disabled. (Specifiy number of weeks during disability)

Date of Agreement 2/12/73

TRAVELERS INS. CO.
Employer or Insurer

By: /s/ [Illegible]

/s/ Willie Williams
Employee

/s/ George S. Newman
Witness to Employee's Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Filed, Mar. 14, 1973, Clerk,

U. S. Dist. Court, Richmond, Va.]
Civil Action No. 537-71-R

JOHN R. DILLARD, individually, and on behalf of all other persons similarly situated, COMPLAINANT

and

WILLIE WILLIAMS, individually, and on behalf of all other persons similarly situated,
APPLICANT FOR INTERVENTION,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, THOMAS P. HARWOOD, JR., Commissioners of the Industrial Commission of Virginia, DEFENDANTS

ORDER

Upon motion of the defendant Thomas P. Harwood, Jr., for good cause shown, it is hereby ORDERD that the said Thomas P. Harwood, Jr., be dismissed as a party defendant and that Robert P. Joyner, his successor in office, be made a party defendant hereto.

Date: Mar. 14, 1973

/s/ [Illegible]
United States District Judge

No. C/A 537-71-R

DILLARD

v.

INDUSTRIAL COMMISSION OF VIRGINIA

PER CURIAM:

This matter is presently before the Court pursuant to the mandate of the Supreme Court of the United States directing the Court to consider whether this cause has been rendered moot by reason of the fact that the originally named plaintiff, Dillard, had, approved by order of the defendant, Industrial Commission of Virginia, entered into a lump sum settlement of his individual claim for workmen's compensation. The respective parties have briefed the issue and the Court has entertained oral argument.

While the usual rule is that an actual controversy must exist at all stages of appellate review, see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), we deal in this instance with a class action wherein the named plaintiff has been found to be an adequate representative of the named class. There can be no doubt that the justiciable issue herein is capable of repetition. See *Rowe* v. *Wade* 41 LW 4213, 4217, January 22, 1973. In addition, one Willie Williams, individually and on behalf of all other persons similarly situated, has moved the Court for leave to intervene as a party plaintiff, which intervention will be permitted, and his proposed complaint will be ordered filed. At the bar of the Court, the defendant Industrial Commission of Virginia and Williams by their respective counsel have stipulated that the issues involved between the intervening plaintiff and defendant Industrial Commission are identical to those issues ruled upon by this Court in its order of July 17, 1972 and all parties have agreed to rest their case on the pleadings and briefs which the Court considered in rendering its opinion of July 17, 1973.

Concluding this action is not moot, an appropriate order will enter.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Filed, Jun. 26, 1973, Clerk,
U. S. Dist. Court, Richmond, Va.]

Civil Action No. 537-71-R

JOHN R. DILLARD, ind., etc.

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL

ORDER

For the reasons assigned in the memorandum this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED:

1. The motion of Willie Williams to intervene herein as a party plaintiff be, and the same is hereby, granted; his proposed complaint be, and the same is hereby filed, and the answer of the defendant Industrial Commission of Virginia filed to the original complaint be, and the same is hereby considered where appropriate as its answer to the complaint of the intervenor.

2. This action is declared a class action and the named plaintiff is representative of the class affected.

3. This cause is not moot and the court's majority opinion and dissenting opinion of July 17, 1972 and its order of the same day be, and the same are hereby, reinstated, effective this date.

Let the Clerk send copies of this order and the memorandum to counsel of record.

/s/ [Illegible]
United States Circuit Judge

/s/ [Illegible]
United States District Judge

/s/ [Illegible]
United States District Judge

Date: June 26, 1973

SUPREME COURT OF THE UNITED STATES

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, etc.,
APPELLANTS,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.

ON CONSIDERATION of the motion of the appellants for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

December 17, 1973

SUPREME COURT OF THE UNITED STATES

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, etc.,
APPELLANTS,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.

APPEAL from the United States District Court for the Eastern District of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument.

December 17, 1973

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 530231 150